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Mothers and Fathers of Invention: The Intellectual Founders of ADR*

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I. INTRODUCTION

When we think of the “founding” of the ADR movement (particularly, but not exclusively, in law), from when do we date it? Whom do we think of as our leaders? Many of us think of Frank Sander and the “multi-door courthouse” suggested by his famous paper, delivered at the Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in 1976.¹ For others, the publication of Roger Fisher and William Ury’s *Getting to Yes*,² signaled an interest in a changed paradigm for engaging in legal negotiations.³ Some may associate ADR’s nascency with early practical efforts to institutionalize “warmer”⁴ methods of disputing. Calling on these methods, the

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¹ Frank E. A. Sander, Varieties of Dispute Processing, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), in 70 F.R.D. 111, 111 (1976).

² ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed. 2d ed., 1991).

³ Of course, I like to think my own article on legal negotiation played some role in the increased interest in studying and teaching negotiation. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

⁴ David Smith, *A Warmer Way of Disputing: Mediation and Conciliation*, 26 AM. J. COMP. L. 205 (Supp. 1978).

civil rights movement, the consumer movement, and local empowerment efforts⁵ all attempted to increase community participation and involvement in issues that were linked to larger social concerns. Yet, as we date most of the modern "ADR movement"⁶ to the 1970s and 1980s, we may be failing to pay enough serious attention to earlier "intellectual" founders of ADR—those who provided the key ideas, concepts or organizing frameworks⁷ from which we have built our modern movement of theories, practices, policies, and institutions. In this essay, I hope to remind us of who went before, and which of their ideas helped generate our current understandings of our field. I also will examine which of these ideas, theories, and concepts continue robustly to influence our practices and which might need to be modified in light of current conditions.

I will explicate some of the key concepts that form the cornerstone of our conceptions of "appropriate dispute resolution" and trace them to their intellectual sources. I do this because I think it is important to elaborate a "jurisprudence of ADR," both to justify and explain the special "morality" and "logic" of different processes of dispute resolution and to prepare us better to defend what we are trying to accomplish against continuing critiques of what is often perceived as a less "just" way of resolving disputes and settling cases.⁸ The

⁵ E.g., THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES 11 (Sally E. Merry & Neal Milner eds., 1993) (describing the San Francisco Community Boards, which opened in 1976, as "one of the most prominent examples of a form of community mediation deeply rooted in community life"); Ray Schonholtz, *Neighborhood Justice Systems: Work, Structure and Guiding Principles*, 5 MEDIATION Q. 3 (1984).

⁶ Both terms are problematic: "ADR" because it usually connotes "alternative" dispute resolution, but is increasingly called "appropriate" dispute resolution, to reflect the fact that most disputes and cases are dealt with outside of trial, so that full-scale litigation, in the form of trial, is really the alternative. Albie Davis & Howard Gadlin, *Mediators Gain Trust the Old-Fashioned Way—We Earn It!*, 4 NEGOT. J. 55, 62 (1988) (renaming "ADR" as "appropriate" dispute resolution). As for "movement," many of us think of ourselves as participating in a "social movement" designed to alter both the processes of conflict management or handling and the kinds of outcomes produced. The social movement aspects of some of the teachings of the founders of ADR, however, have been transformed into caseload reduction and efficiency policy mandates that have tended to bureaucratize and pacify the more socially transformative aspects of the political movement. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or the "Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991).

⁷ In this essay, I am primarily interested in our more recent "intellectual" history, as contrasted to the much longer history of ADR practices. E.g., JEROLD AUERBACH, *JUSTICE WITHOUT LAW?* (1983); Carrie Menkel-Meadow, *Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 UCLA L. REV. 1613 (1997).

⁸ E.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995); Carrie Menkel-

relation of dispute processes to the larger project of explicating a theory of law in jurisprudential terms remains to be completed.⁹ Ours has been an eclectic field intellectually, and we have used, borrowed, and elaborated on ideas that have come to us from many different fields, not only from law and legal theory, but from anthropology, sociology, international relations, social and cognitive psychology, game theory and economics, and most recently, political theory. Like any new field, we can ask if we have an intellectual core or canon of our own, whether we need one, or whether we are, in fact, stronger or more robust because we do straddle so many different fields. As one who believes deeply in multi-disciplinary study and multi-causal explanations of social behavior, I think our field of “ADR” or conflict resolution is richer for its multiple sources of insights and sensitivity to the interactive effects of law and legal institutions with other social institutions. If our field’s purpose is to provide fair, just, and more harmonious solutions to human problems, then we will not easily be cabined to teachings from law and legal theory alone.

The key concepts (and their intellectual elaborators¹⁰) that inform our efforts to create more flexible and varied processes for dispute handling¹¹ and more

Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663 (1995). In one sense, Plato may have articulated one version of ADR jurisprudence. In discussing first, second, and third best judges, he suggests that the judge who can reconcile divided parties to each other (albeit through law) may be the best judge of all (better than those who “rule”):

Which [judge] would be better: the one who destroyed the wicked among them and set the better to ruling themselves, or the one who made the worthy men rule and allowed the worse to live while making them willing to be ruled? But I suppose we should also mention the judge who is third in respect to virtue—if there should ever be such a judge—one capable of taking over a single divided family and destroying no one, but rather reconciling them by laying down laws for them for the rest of time and thus securing their friendship for one another.

PLATO, *THE LAWS OF PLATO* 6 (Thomas L. Pangle ed. & trans., Basic Books 1980); DAVID LUBAN, *LEGAL MODERNISM* 322–23 (1994).

⁹ For examples of some recent efforts, see STUART HAMPSHIRE, *JUSTICE IS CONFLICT* (2000); CARRIE MENKEL-MEADOW, *INTRODUCTION, MEDIATION: THEORY, PRACTICE AND POLICY* (forthcoming 2001). This is one of the deep jurisprudential issues that Lon Fuller sought to address in his series of essays on process discussed *infra* Part IV. One could ask, for example, what is the theory of law that includes variations of process for its development, interpretation, and implementation? Or, does the process of dispute resolution require theorizing outside of law and legal institutions, belonging instead to the political philosophy and sociology of conflict?

¹⁰ I am selecting a few representative intellectual founders of each concept. In many instances, there are several theorists or researchers that have informed the development of an idea or a cluster of concepts which have influenced the “theory” of ADR.

tailored, just or efficient solutions to problems include “the nature and function of conflict” that we learn from Georg Simmel,¹² Lewis Coser,¹³ Morton Deutsch,¹⁴ and Mary Parker Follett¹⁵ via sociology, social psychology, social work, business and public administration. Also encompassed in a broader view of conflict are “the social and cultural contexts of disputing,” as elaborated by Laura Nader and other anthropologists and socio-legal scholars.¹⁶ The functional and moral variations of different dispute processes are developed by Lon Fuller,¹⁷ whom I have dubbed the “jurisprude of ADR,”¹⁸ and Soia Mentschikoff.¹⁹ Differences in the “quality of outcomes” produced by different processes have been studied and theorized by Vilfredo Pareto,²⁰ George Homans,²¹ and more recently, Robert Axelrod.²² The social psychology of strategic processes and decision making are explored by game theorists and

¹¹ I prefer this term to “dispute or conflict management or resolution,” which assume that the disputes and conflicts will be finally put down or ended, when, in reality, conflict may continue in a different form or may be “productive” in some way so that it should not be squelched.

¹² GEORG SIMMEL, *CONFLICT* (Kurt H. Wolff et al. trans., 1955).

¹³ LEWIS COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* (1964).

¹⁴ MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES* (1973); *CONFLICT, COOPERATION AND JUSTICE: ESSAYS INSPIRED BY THE WORK OF MORTON DEUTSCH* (Barbara Benedict Bunker et al. eds., 1995); *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE* (Morton Deutsch & Peter Coleman eds., 2000).

¹⁵ MARY PARKER FOLLETT, *PROPHET OF MANAGEMENT: A CELEBRATION OF WRITINGS FROM THE 1920S* (Pauline Graham ed., 1996).

¹⁶ E.g., *THE DISPUTING PROCESS—LAW IN TEN SOCIETIES* (Laura Nader & Harry Todd eds., 1978); P.H. GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE* (1979); KEVIN AVRUCH, *CULTURE AND CONFLICT RESOLUTION* (1998); Richard Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 *LAW & SOC’Y REV.* 217 (1973).

¹⁷ LON L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* (Kenneth I. Winston ed., 1981).

¹⁸ Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities*, 38 *S. TEX. L. REV.* 407, 449 (1997).

¹⁹ Soia Mentschikoff, *The Significance of Arbitration*, 17 *LAW & CONTEMP. PROBS.* 699 (1952); Soia Mentschikoff, *Commercial Arbitration*, 61 *COLUM. L. REV.* 846 (1961).

²⁰ E.g., VILFREDO PARETO: *SOCIOLOGICAL WRITINGS* (S.E. Finer ed., 1966).

²¹ GEORGE CASPAR HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS* (1961) (teaching the important lesson that human beings often have complementary, not competing needs, and can therefore achieve “trades” that make both parties better off, following trades and negotiations, than they would be without such interactions).

²² ROBERT M. AXELROD, *THE EVOLUTION OF COOPERATION* (1984); see also ROBERT M. AXELROD, *THE COMPLEXITY OF COOPERATION: AGENT-BASED MODELS OF COMPETITION AND COLLABORATION* (1997).

decision scientists, like Howard Raiffa²³ and social and cognitive psychologists.²⁴ The structure of and effectiveness of institutionalization of different processes was initially described by Henry Hart and Albert Sacks²⁵ and the “legal process” theorists of the 1950s and now informs the work of a number of scholars, focused on a “new” legal process²⁶ approach to dispute resolution and problem solving, including modern democratic discourse theorists (Jurgen Habermas,²⁷ Amy Gutmann and Dennis Thompson²⁸) and their application to a variety of new dispute resolution processes.²⁹ My purposes in briefly reviewing the major intellectual contributions of this widely diverse and somewhat arbitrary group of social theorists and empiricists to our field is to illuminate where we have come from so we can both understand and remember our philosophical roots and so we can extend their theories and examine their applicability to today’s concerns about fair and just treatments of disputes and conflicts, at individual, group, nation-state, and international levels.

²³ HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); JOHN HAMMOND ET AL., *SMART CHOICES: A PRACTICAL GUIDE TO MAKING BETTER DECISIONS* (1998).

²⁴ E.g., DANIEL KAHNEMAN ET AL., *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (1982); RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980).

²⁵ HENRY M. HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

²⁶ I am going to distinguish here “new legal process” in the institutionalization of dispute processes and their justification from what Ed Rubin has tried to claim as a “new legal process” school in the empirical study and conceptualization of the “new micro-institutionalism” of legal institutions. See e.g., Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996); see also Edward L. Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521 (1997).

²⁷ JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE OF LAW AND DEMOCRACY* (William Rehg trans., MIT Press 1996) (1992).

²⁸ AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); *DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT* (Stephen Macedo ed., 1999); JAMES BOHMAN, *PUBLIC DELIBERATION: PLURALISM, COMPLEXITY AND DEMOCRACY* (1996); MARK KINGWELL, *A CIVIL TONGUE: JUSTICE, DIALOGUE AND THE POLITICS OF PLURALISM* (1995).

²⁹ E.g., *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* (Lawrence Susskind et al. eds., 1999); *A PRACTICAL GUIDE TO CONSENSUS* (Jim Arthur et al. eds., 1999); CARRIE MENKEL-MEADOW, *The Limits of Adversarial Ethics*, in *ETHICS IN PRACTICE* (Deborah Rhode ed., 2000); *Innovations in Process: New Applications in ADR*, DISP. RESOL. MAG., Summer 1998, at 4–27.

II. THE SOCIAL FUNCTION OF CONFLICT: CONSTRUCTIVE AND CREATIVE CONFLICT

In the law, we tend to call our field "dispute resolution," which connotes its origins in cases and disputes³⁰ or "trouble cases," as the legal anthropologists call it. In fact, dispute resolution is situated in a broader intellectual space of the sociology or philosophy of the role of conflict.³¹ While many in the ADR field think of conflict as a problematic aspect of human life, requiring "resolution" or "management," many social theorists prefer to see conflict as variable: sometimes "destructive," but sometimes "constructive" or even creative, even an opportunity for learning and growth. The sociologists Georg Simmel and Lewis Coser argued that conflict can be a very positive social force that prevents stagnation, stimulates curiosity and learning, "airing" of problems, and the search for new solutions at both individual and social levels. Conflict can help forge identity and cohesiveness (especially when threatened from without) and can help identify what is really important. Working with both individual and social conflicts helps articulate and test what norms and rules should be applied to situations³² and successful "negotiation" through conflict makes both individuals and groups stronger by demonstrating survival and flexibility skills and permitting continuity. Building on this work, which treats conflict not as a "negative" but as a "variable," social psychologist Morton Deutsch, among

³⁰ William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-81) (describing the social construction of dispute occurrences, recognition, definitions, attributions, and variations in claiming behavior).

³¹ For a recent and eloquent statement of the importance of conflict in any philosophically just society, see generally HAMPSHIRE, *supra* note 9, suggesting that substantive conflict can never be eliminated in a diverse society. Hampshire argues that what we can agree about is procedural fairness in the treatment of conflicts, where the "two" sides to any conflict are granted a fair hearing and procedures are sufficiently acceptable to those to whom they are meant to apply. I agree with much of Hampshire's statements about the relation of conflict to justice, except that, in my view, conflicts are not only two-sided. He seems to import an unquestioned acceptance of the Anglo-American adversary system as an ideal form of procedural fairness. For my critique of these assumptions, see Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996) (suggesting that modern disputes have multiple issues and multiple parties and are not simply "two-sided").

³² Remember that in one of the first law review articles on negotiation, Melvin Eisenberg argued that even transactional negotiations were norm-creating, just as much as litigation-based dispute negotiations were. See generally Melvin Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

others, has developed a taxonomy of different kinds of conflicts, allowing us to see that with variability of structure and function, there can also be variability of approaches to conflict handling. Social psychological models of conflict categorize on the basis of type of dispute³³ and on the perceptions or relations of the parties (*i.e.*, do the parties see things the same way or differently, are there multiple parties, other constituents, is there an on-going relation, is the conflict manifest or latent, direct or misattributed).³⁴

Even before these discussions of the social function of conflict, Mary Parker Follett, one of the leading “mothers,”³⁵ of invention in ADR talked about “constructive conflict” in the context of organizational and labor disputes. Serving as the inspiration for many early practitioners of recent ADR,³⁶ Mary Parker Follett trained as a political scientist, then used her knowledge first in social work and then in organizational management and international affairs. She lectured frequently in personnel management contexts and was interested in how groups, using principles of democratic governance, could work together and produce better outcomes than hierarchically produced orders. Participation, constructive conflict, creativity, circular responses, and integrative behavior—the principles to which Follett devoted her life—are the touchstones of much of what we teach and hope to accomplish in good dispute resolution environments. Follett often spoke enthusiastically about the functions of conflict, and in one of my favorite passages, she says:

As conflict—difference—is here in the world, as we cannot avoid it, we should, I think use it. Instead of condemning it, we should set it to work for us. Why not? What does the mechanical engineer do with friction? Of course, his chief job is to eliminate friction, but it is true that he also capitalizes friction. The transmission of power by belts depends on friction between the belt and

³³ What I have called the “res” of the dispute is a thing, a feeling or understanding, a relationship, a value conflict. Must the “res” or thing be divided (is it a scarce resource) or can it be shared in some way? Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. B. FOUND. RES. J. 905, 927.

³⁴ DEUTSCH, *supra* note 14, at 11–17.

³⁵ For some of us, it is heartening to discover that the idea of “integrative” solutions to situations of conflict, in fact, originated with a woman. As in many other fields of endeavor, some of the “fathers” got the credit they might not have wholly deserved. For instance, in their classic book on labor-management negotiations, Richard Walton and Robert McKersie discussed and cited Follett’s work, but they seem to have walked off with the credit for the idea. *See generally* RICHARD WALTON & ROBERT MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* (1965); Deborah Kolb, *The Love for Three Oranges Or: What Did We Miss About Ms. Follett in the Library?*, 11 NEG. J. 339 (1995).

³⁶ Albie M. Davis, *An Interview with Mary Parker Follett*, 5 NEGOT. J. 223 (1989).

the pulley. . . . The music of the violin we get by friction. . . . We talk of the friction of mind on mind as a good thing. So in business too, we have to know when to try to eliminate friction and when to try to capitalize it, when to see what work we can make it do. That is what I wish to consider here, whether we can set conflict to work and make it *do* something for us.³⁷

For Follett, there were three ways conflict was dealt with: domination, compromise, or integration. She urged integration as a process where new solutions would emerge from parties trying to meet their desires without the compromise of having to give up something.³⁸ It is her story we often tell when we describe integrative solutions, when she was one of two readers in a library, arguing about an open window. She wanted the window closed because of a draft; the other patron wanted fresh air; the solution was to open a window in another room for indirect air to circulate.³⁹ In her view, the likelihood of integrative solutions, in which parties do not necessarily have to give anything up, are increased by bringing differences out into the open, facing the conflicts and underlying desires, evaluating and re-valuing desires and preferences when the other parties' desires are made known, and looking for solutions in which the "interests may fit into each other."⁴⁰ Follett was undoubtedly an optimistic person believing that such mutual interests could be found, but she also thought that by uncovering real interests we would be able to distinguish "the significant" from "the dramatic" (perhaps another way of understanding the notion of looking to the interests behind the positions). She urged a series of very practical solution-seeking moves that are remarkably robust to this day and now serve as the model for suggestions about how to solve legal problems and seek creative solutions. She suggested "disaggregation" of problems (making them smaller), by looking at their constituent elements, what is often referred to as "breaking up the whole." She also suggested that sometimes, the opposite could be true; that we should search for the "whole demand—the real demand" which might be

³⁷ FOLLETT, *supra* note 15, at 67–68.

³⁸ Thus, she held similar views to those of us who say that negotiation, mediation, and other forms of ADR are not about compromise. See generally John Coons, *Compromise As Precise Justice*, in COMPROMISE IN ETHICS, LAW AND POLITICS 190 (J. Roland Pennock & John Chapman eds., 1979); MENKEL-MEADOW, *supra* note 9; John Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. U. L. REV. 750 (1964).

³⁹ FOLLETT, *supra* note 15, at 69; FISHER & URY, *supra* note 2, at 40. She is also often credited with the orange story where one person desires the orange, the other the peel. Kolb, *supra* note 35, at 339; see also her description of the argument between dairy farmers about unloading on a platform that was reconfigured to support both of them, FOLLETT, *supra* note 15, at 69–70.

⁴⁰ FOLLETT, *supra* note 15, at 75.

obscured by miscellaneous minor claims.⁴¹ Follett anticipated the scripted negotiation plans of today, as well as the complex “webs” of “polycentric” disputes⁴² by suggesting that the good conflict manager would “anticipate” responses and recognize that every action by oneself set off a reaction in the other that one would then respond to; in other words, our actions and responses are all “circular” or “interdependent” in today’s language. Follett suggested that we are equally responsible for anything that happens as a result of setting in motion our own actions and responses to our own actions.⁴³ Follett believed that we hurt ourselves whenever we see ourselves “imprisoned” in an “either-or situation,”⁴⁴ urging people to look for solutions that were better than the two obvious alternatives. Because “integrative” solutions require innovation and imagination, she believed (and preached) dynamic, participative and creative problem solving. Those in business administration and management who are looking at consensus building, participatory leadership, and joint venture models of economic decisionmaking are currently appreciating Follett’s work.⁴⁵

Part of the attraction of her work is that Follett wrote and spoke clearly and simply. She was one of the first to successfully marry theory and practice, for she had a firm belief that it was only through the experience of achieving integrative solutions that people could fully understand that achievement; understanding (like Weber’s *verstehen*) had to be “knitted into the structure of [one’s very] being.”⁴⁶ She saw that solutions to negotiated problems and conflicts would emerge from relationships and interconnected interaction, not from top-down force or artificially imposed ideas or concepts.

This mother of invention saw clearly in the 1920s that there were better ways to make use of conflict—to embrace it and to use it for more creative and innovative solutions,⁴⁷ in addition to the purpose of making more peace or better

⁴¹ FOLLETT, *supra* note 15, at 79. Many of these useful and concrete suggestions for seeking integrative solutions, including contingent solutions and conditional agreements, have been elaborated in DAVID LAX & JAMES SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (1986) and MAX H. BAZERMAN & MARGARET NEALE, *NEGOTIATING RATIONALLY* 89–101 (1992).

⁴² Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971).

⁴³ FOLLETT, *supra* note 15, at 81.

⁴⁴ Though she did not operate in the legal system, she did work in another adversarial, “two-sided” environment—labor relations.

⁴⁵ E.g., FOLLETT, *supra* note 15, at 87; John Child, *Organizational Structure, Environment and Performance: The Role of Strategic Choice*, 6 SOC. 1 (1972).

⁴⁶ Davis, *supra* note 36, at 227.

⁴⁷ For a recent effort to reintroduce these ideas into creative legal problem solving, see generally Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, HARV. NEGOT. L. REV. (forthcoming 2001).

processes (though she believed in those things too). Follett saw better, more satisfying and longer lasting outcomes in integrative solutions that were not the result of contested and "split the difference" compromise. In this, she sought better, more pareto-optimal solutions, like so many of the major contributors to the ADR field.

III. THE SOCIAL AND CULTURAL CONTEXTS OF DISPUTING

It is somewhat ironic that one of the most influential "mothers" of our field has demonstrated a complex, if ambivalent, perspective on disputing processes. As one of the leading legal anthropologists who helped to conceptualize the study of disputes and legal systems as one of the most important constituent elements of a society, Laura Nader described and valorized the mediational practices of the Zapotec Indians she studied in Talea, Mexico.⁴⁸ There, she demonstrated how a closely knit and isolated community drawing on its needs for internal harmony and solidarity created a mediation-like dispute resolution process.⁴⁹ Some years later (and at one of the Schwartz lectures at The Ohio State University College of Law), Nader denounced American "deformations" of informal disputing processes where "pacification" and the desire for peace were seen to be in opposition to the achievement of justice through confrontation in the courts.⁵⁰

Like other legal anthropologists who seem to venerate American forms of legalism when they are home,⁵¹ Nader reminds us that disputing processes are

⁴⁸ LAURA NADER, *HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE* (1990); see also *LITTLE INJUSTICES: LAURA NADER LOOKS AT THE LAW* (Odyssey Films, PBS Video, 1980).

⁴⁹ In a pathbreaking empirical study of disputing within an American context, law and economics scholar Robert Ellickson demonstrated how closely interdependent neighbors (cattle ranchers in a remote California county) evolved cooperative dispute resolution mechanisms as well as their own substantive rules, outside of the formal institutions and directions of substantive law. Ellickson's empirical study demonstrated, to his surprise, the "trumping" of both formal law and law and economics theories (the Coase Theorem) by norms of social cooperation (now called "social norm theory"). ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

⁵⁰ Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993); see also Laura Nader, *The ADR Explosion—The Implications of Rhetoric in Legal Reform*, 8 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 269 (1988).

⁵¹ E.g., RICHARD ABEL, *THE POLITICS OF INFORMAL JUSTICE* (1982); SALLY MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990). Cf. William L. F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 86 (1974) (suggesting that we need more field

intimately tied to the culture in which they are situated. Legal regimes both constitute and are constitutive of the cultures in which they are embedded and the way people “process” conflicts and disputes tells us a great deal about what their culture values. Disputing institutions will reflect the culture’s values, and it may not be wise to attempt to transplant a form of disputing that is not indigenous to or compatible with a different culture. Legal anthropologists see variation and are interested in comparisons, as well as processes of change; they are less inclined to see universal or uniform structures that can be made to work in quite the same way in different cultural settings.⁵² Thus, in her later work, Nader denounces court ADR programs as efforts to import a non-American form of mediation to manage and divert important legal cases from the docket. Nader is particularly concerned that settlement, mediation, and the secrecy which often accompanies them will prevent important facts from becoming publicly known, in a culture that prizes public knowledge, class action lawsuits, precedents and punishment, perhaps more than it values peace and harmony.⁵³ In Nader’s analysis, the American ADR movement was captured by a coercive ideology and court administrative hierarchy that sought to diminish caseloads at a time of expanding legal rights for the disempowered.

Nader reminds us that methods of dispute resolution, in all of its forms, are not neutral—they are designed and implemented by parties, court administrators or governments with substantive agendas. Thus, we must always interrogate the

studies of American dispute resolution institutions to compare to what has been studied in “foreign” sites, from where most dispute theory has been derived).

⁵² See generally CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (2d ed. 2000); AVRUCH, *supra* note 16; MARK H. ROSS, *THE MANAGEMENT OF CONFLICT: INTERPRETATIONS AND INTERESTS IN COMPARATIVE PERSPECTIVE* (1993). For a rigorous attempt to analyze the comparative universals and differences in dispute resolution institutions, both in time (history) and place (culture), see generally MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981).

⁵³ Nader has studied American consumer disputes, as well as disputes in other cultures, by receiving reports of consumer complaints from hundreds of letters obtained from her consumer advocate brother, Ralph Nader. Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 1003 (1979). It was the dogged investigative and litigative efforts of Ralph Nader that produced evidence of design defects in the Chevrolet Corvair, responsible for many automobile deaths. RALPH NADER, *UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* (1965); Jonathan Rabinovitz, *Nader’s Museum of Liability: Corvairs, Pintos and Implants*, N.Y. TIMES, July 28, 1998, at A1 (observing Ralph Nader’s efforts to reveal “design flaws of the Chevrolet Corvair and other automobiles”); Stuart Diamond, *Warren Anderson: A Public Crisis, A Personal Ordeal*, N.Y. TIMES, May 19, 1985, at 1 (noting that “General Motors responded to consumer advocate Ralph Nader’s discovery of safety problems with the [Chevrolet] Corvair by initiating a personal attack against Mr. Nader”).

purposes for which a process of dispute resolution is being invoked. How did this particular institution come to be? What values does it serve? Who is achieving what with the particular structure of the system in place? In dispute resolution, power will be located somewhere, and there are consequences to who possesses and controls it and how that power will be exercised.⁵⁴ For Nader, there is always the danger that externally imposed dispute resolution systems (whether imposed by American judges or legislators in domestic situations⁵⁵ or “rule of law” legal institutions or American-style arbitration in “foreign countries”) are designed to “colonize” or “control” those who would have disputes or conflicts, either with each other or with the state or other official “regimes.” Attempts to “universalize” or “globalize”⁵⁶ legal procedures or dispute resolution systems (such as in international or multi-national regimes) will either run roughshod over specific community or nation-state practices or be seen for what they are—conflict resolution by “domination.”

Nader’s attention to the social and cultural situatedness of dispute resolution has resonated with a number of critics of ADR, both about mediation and arbitration, usually in their compulsory or mandatory forms. Thus, where mediation is thought to be designed to provide flexible, future-oriented solutions, critics point out that in cases of divorce, wronged and financially less secure women may be manipulated to compromise and give up too much.⁵⁷ Similarly, others have argued that without the protection of the “rule of law” and the

⁵⁴ For a more recent application of these theories and questions on attempts to negotiate nuclear waste storage on American Indian lands, see generally Laura Nader & Jay Ou, *Anthropological Perspectives: Idealization and Power: Legality and Tradition in Native American Law*, 23 OKLA. CITY U. L. REV. 13 (1998).

⁵⁵ Nader does not see the client empowerment and choice agenda promoted by many proponents of multi-door courthouses and court-annexed ADR. Sander, *supra* note 1. Instead she sees a deliberate plan to turn back the rights revolution of the 1960s in Supreme Court Justice Warren Burger’s embrace of ADR as a docket clearing device. Warren Burger, *Agenda for 2000 A.D.: A Need for Systematic Anticipation*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 23–25 (A. Leo Levin & Russell Wheeler eds., 1979); Warren Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62.

⁵⁶ Nader argues that globalization is not new; the colonial powers all sought globalization of their interests and cultures. What is new is American globalization and institutional imperialism. Laura Nader, *Comments*, 46 AM. J. COMP. L. 751, 754 (1998). See generally THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999).

⁵⁷ Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1603 (1991); Carrie Menkel-Meadow, *What Trina Taught Me: Reflections on Mediation, Inequality, Teaching and Life*, 81 MINN. L. REV. 1413, 1420 (1997). *Contra* Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467, 492–93 (1991); Joshua Rosenberg et al., *Use of ADR in California Courts: Findings & Proposals*, 26 U.S.F. L. REV. 343, 390 (1992).

formality of the courtroom, racial and ethnic minorities⁵⁸ as well as the economically disadvantaged⁵⁹ will be taken advantage of by the more contextually powerful within the informal settings of ADR. Though she is not the only one, Nader's political and anthropological critique has provided an important standard against which to measure whether justice is being compromised in the quest for other values, like peace, harmony, or simple caseload reduction. Nader also reminds us that comparative law and legal anthropology studies may not tell us the same things. Legal scholars tend to export their concepts, like courts, mediation, and dispute resolution, and measure them against or compare them to an ethnocentrically developed model,⁶⁰ while anthropologists are more likely to see the variations, not only in institutions, but in nomenclature and purpose.⁶¹

IV. THE FUNCTIONAL AND MORAL INTEGRITY OF DISPUTE PROCESSES

If dispute resolution systems have social and cultural variations, Lon Fuller and Soia Mentschikoff (among other legal theorists of both the legal realism and legal process schools) argued that each dispute resolution process has its own particular function, purpose, morality, and integrity. In many ways, Lon Fuller remains the only legal philosopher to take theorizing about dispute resolution processes seriously. Like his intellectual executor, Kenneth Winston,⁶² I believe

⁵⁸ MICHELE HERMANN ET AL., THE METROCOURT PROJECT FINAL REPORT, at x (1993); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1396; Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767, 789 (1996).

⁵⁹ ABEL, *supra* note 51, at 3.

⁶⁰ I have argued elsewhere that American mediation can be seen as an ethnocentrically biased approach which privileges talk and psychological and interpersonal problem solving over reticence or other forms of dispute resolution. Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformations of Traditions, Ideologies, Paradigms and Practices*, 11 NEGOT. J. 217, 223 (1995).

⁶¹ Laura Nader, *A Comparative Perspective on Legal Evolution, Revolution, and Devolution*, 81 MICH. L. REV. 993, 995-97 (1983).

⁶² FULLER, *supra* note 17, *Introduction*, at 12. A few other scholars have made the connection between Fuller's legal philosophy and dispute resolution theory. See, e.g., STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 47 (1988); Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1275 (1995); Alfred W. Meyer, *To Adjudicate or Mediate: That is the*

that Fuller was interested in the differences among the different legal processes because he practiced law (during World War II with the law firm of Ropes and Gray in Boston) and continued to serve as an arbitrator, even after resuming teaching and scholarship at Harvard. Because he was a “reflective practitioner,”⁶³ who enjoyed lawyering and thought that lawyers were socially useful,⁶⁴ as well as a thoughtful scholar who recognized the different modalities of argument, decision, and action in different legal fora, Fuller was able to attempt a detailed analysis of the particular moralities of the different processes he wrote about, including adjudication, arbitration, mediation, legislation, contract, and managerial direction.⁶⁵ In his expositions of the “essentials” of each of these processes he has been labeled a “secular natural law” theorist, because of his attributions of an almost theological purity to each of the separate legal processes.

For Fuller, different case types, parties and particular needs led, logically, if not inexorably, to a particular legal process.⁶⁶ Each kind of legal process had its own internal structure, logic, and even an essential morality. In this, Fuller was an essentialist⁶⁷ and a legal moralist. While many of his statements about and definitions of these processes remain classic in their analytic purity and rigidity, they can, in some respects, help us take stock of the dispute resolution field and how it has evolved. As the scope and breadth of dispute resolution has become more complicated and has developed moralities of its own,⁶⁸ Fuller’s

Question, 27 VAL. U. L. REV. 357, 367 (1993); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 843–44 (1985).

⁶³ DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983); Richard K. Neumann, Jr., *Donald Schön, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401, 412 (2000).

⁶⁴ David Luban, *Rediscovering Fuller’s Legal Ethics*, 11 GEO. J. LEGAL ETHICS 801, 801 (1998).

⁶⁵ In some versions he added elections and lotteries as other “legal processes.” Kenneth I. Winston, *Introduction to PRINCIPLES OF SOCIAL ORDER*, *supra* note 17 at 27.

⁶⁶ In this, I believe he was closer to the structural functionalism of the American sociology of the 1950s than others would allow. *E.g.*, TALCOTT PARSONS, *ON INSTITUTIONS AND SOCIAL EVOLUTION* 106–114 (Leon H. Mayhew ed., 1982). *Contra* Kenneth I. Winston, *Introduction to PRINCIPLES OF SOCIAL ORDER*, *supra* note 17 at 31 (Winston separates Fuller’s conceptions of legal institutions from sociological “functionalism”); Bone, *supra* note 62, at 1313 n.152. *See generally* RETHINKING PROGRESS: MOVEMENTS, FORCES AND IDEAS AT THE END OF THE 20TH CENTURY (Jeffrey C. Alexander & Piotr Sztompka eds., 1990).

⁶⁷ “Our task is to separate the tosh from the essential.” Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 356 (1978).

⁶⁸ Whether ADR processes actually require their own moralities in the form of formal ethical rules is a subject on which I have spilled much ink. *E.g.*, Carrie Menkel-Meadow,

pronouncements on the internal integrity of each process may no longer compel us with the persuasive force they once had.

Lon Fuller was particularly interested in patterns of social ordering in which law provided a basic structure of empowering laws (procedural or adjectival law) that helped institutions develop substantive or “restraining” rules, which, in turn, permitted society to function. Fuller wanted to call the phenomenon in which he was interested *eumonics*, or “the science, theory, or study of good order and workable social arrangements.”⁶⁹ For Fuller, law was a “problem solving activity” purposively directed towards enabling voluntary transactions and contracts, preventing violence, defining ideals and standards for civic participation, as well as providing a means for settling disputes and preserving social harmony. Law was enacted in and enforced by a variety of different legal institutions, which is why some commentators refer to him as concerned, above all else, with “problems of institutional design,”⁷⁰ or as an “architect of social structure.”⁷¹ Fuller saw that lawmaking and rulemaking occurred in the realms of private ordering—negotiating contracts and mediating solutions produced as much “law” as the public institutions of courts and legislatures. In his efforts to elaborate the different structures, functions, and moralities of different legal processes, Fuller wrote the first description of, and most sustained argument for, mediation. He said that this conciliatory process, which did not require a decision of state-made law, would “reorient the parties to each other” and “brin[g] about a more harmonious relationship between the parties, whether this be achieved through explicit agreement, through a reciprocal acceptance of ‘social norms’ relevant to their relationship or simply because the parties have been helped to a new and more perceptive understanding of one another’s problems.”⁷² For Fuller, as for other theorists of mediation, its principal functional strength lay in its release of the parties “from the encumbrances of rules and of accepting, instead, a relationship of mutual respect, trust and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions laid

Ethics in Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities, 38 S. TEX. L. REV. 407, 408 (1997); Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice*, 10 GEO. J. LEGAL ETHICS 631, 658 (1997); Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 163–67 (1999).

⁶⁹ Kenneth I. Winston, *Introduction* to PRINCIPLES OF SOCIAL ORDER, *supra* note 17 at 14.

⁷⁰ *Id.* at 13, 31.

⁷¹ Luban, *supra* note 64, at 817.

⁷² Fuller, *supra* note 42, at 308.

down in advance.”⁷³ Mediation, in Fuller’s words, is for “the administration and enforcement of rules or social norms”⁷⁴ between parties, not for the creation of state-made law.

Fuller’s functionalist definition of mediation, as being confined to either the improvement or termination of relationships (he focused on collective bargaining, divorce, and other familial relations and long-term business contracts), remains an important strand in the current justification of mediation which either assumes a long-term relationship between the parties, or hopes that even a single conflictual encounter can be transformed into an event of “mutual recognition, understanding, and empowerment.”⁷⁵ Whether mediation ought to be confined to particular kinds of disputes or whether it can be used in any form of conflict or dispute remains a much debated question today.⁷⁶

Lon Fuller, as the leading jurisprudential thinker about ADR, as well as a legal pluralist, recognized that different kinds of disputes required different kinds of processes and that processes themselves might be limited in their appropriateness for certain human activities. For Fuller, each process of decisionmaking, or as he preferred to say, “problem solving”⁷⁷ had its own logic, morality, and function. Fuller acknowledged that not all legal disputes or social problems were similarly structured. Where a problem was like a “spider web” in which unraveling one thread of a “polycentric” problem (such as deciding a single legal issue in a web of relationships such as occurred in a factory among labor and management or in a marriage) might destroy the whole web, mediation, with its ability to work on many issues at the same time and focus the parties on their relationship concerns, would be better.⁷⁸

Fuller’s prescient essay on the functional logic of mediation as a process of relationship recommitment and reorientation in situations which would be inappropriate for adjudication is less accurate when it comes to the structure of disputes. Fuller wrote that mediation worked best with dyadic conflicts, and he failed to anticipate the extensive use of mediation processes in complex multi-party disputes like environmental matters, resource allocations, mass torts, or complex commercial disputes with insurers present. Fuller also seems somewhat

⁷³ *Id.* at 325–26.

⁷⁴ *Id.* at 328.

⁷⁵ ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 94–95 (1994).

⁷⁶ Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 50 (1994) (presenting a taxonomy for deciding which dispute process is appropriate for particular purposes).

⁷⁷ Letter from Lon L. Fuller to a Colleague at Harvard Law School (1972), in *THE PRINCIPLES OF SOCIAL ORDER*, *supra* note 17, at 125.

⁷⁸ Fuller, *supra* note 42, at 326.

contradictory about the role of “lawmaking” in mediation when he asserts that mediation is for administration and enforcement of laws and not for “state” lawmaking, while simultaneously recognizing that the process of mediation “enables the parties to work out their own rules. The creation of rules [such as in the labor-management relation] is a process that cannot itself be rule-bound”⁷⁹ Mediation, then, is a site for private lawmaking, or, in Fuller’s terms, “rulemaking” which, when developed from sufficient mutual trust between the parties, will not require drawing on the formal contract.

Fuller saw mediation as internally justified by its orientation to the parties’ relationships, and it is their mutuality, consent, and reciprocity that guides the process and legitimates it. If there is an external justification for mediation in Fuller’s conception, it is that mediation is essentially a private process between a third party facilitator and two parties already in a relationship or trying to make a relationship work. Thus, Fuller’s conception supports the claims of those mediation proponents who seek to keep mediation voluntary, consensual, facilitative, and non-evaluative.⁸⁰

On the other hand, Fuller’s jurisprudence is sufficiently protean that he recognized the existence, if not the full value, of what we currently refer to as “mixed processes” which render the structure of mediational processes far more complex and have led to our current debates about the forms of techniques and “evaluations” in mediation. He observed mixed models of negotiation, mediation, and arbitration, with “threats” of adjudication, at the War Labor

⁷⁹ In his essay on the limits of adjudication, Fuller notes that the American Arbitration Association “strives to keep its arbitrators from assuming the role of mediators,” so that they will not confuse claims of rights from the kind of relationship readjustment that is the mainstay of mediation. Fuller, *supra* note 67, at 370; *see also* Fuller, *supra* note 42, at 326.

⁸⁰ Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 938 (1997).

Board during World War II. He recognized the teachings of his Legal Process school colleagues, Henry M. Hart (not to be confused with H.L. A. Hart!) and Albert Sacks⁸¹ that multiple procedures of “institutional settlement” (including various forms of legal decisionmaking) “enriched the routes to social ordering” and made them more “flexible by various mixed forms.”⁸²

Yet Fuller’s work is still best known for seeking to elucidate the particular moralities of particular process modalities. Fuller’s strength as a theorist of process is that he fully elaborated the structures and functions and the “internal” moralities of each of the legal processes he studied. He gave us what probably still is the deepest and most “classic” statement of what mediation is. However, perhaps because he was somewhat encumbered by the structuralist-functionalist schools of both social science and the legal process school of jurisprudence of the 1950s and 1960s, structure and function were seldom rearranged or allowed to “mix” in his work on social ordering. Today’s “hybrid” processes combine the structures of negotiation, mediation, and arbitration to attempt to perform a wide variety of functions, from relationship reorientation to dispute settlement to conflict resolution to administrative rulemaking and public policy decisionmaking. It would be fascinating to see what Lon Fuller would make of

⁸¹ HART & SACKS, *supra* note 25.

⁸² LON L. FULLER, *Irrigation and Tyranny*, in PRINCIPLES OF SOCIAL ORDER *supra* note 17, at 200. In this piece, Fuller presciently sees the modern environmental mediation: “Problems concerned with the sharing of water supplies and the joint utilization of river systems are inherently unsuited to adjudicative solution, involving as they do a complex interplay of diverse interests.” *Id.* at 210. Although Fuller saw modern administrative law in the management of water issues, much of what he says in this article anticipates the coordination of “joint utilization” in many modern environmental mediations.

these more flexible procedural institutions as the modern world of social ordering develops increasing complexity and reorganizes structures to meet the requirements of different functions.

The debates represented in current controversies surrounding the use of mediation continue the challenge that Fuller has set for us—do particular forms of dispute resolution or problem solving institutions have their own integrity, logic, and morality? Are the techniques, procedures, and mechanics of each suitable only for a particular process, a particular kind of problem?⁸³ Should arbitrators⁸⁴ and judges⁸⁵ never mediate, and mediators⁸⁶ never adjudicate or evaluate? In Fuller's views these separate processes should never be mixed:

Mediation and arbitration have distinct purposes and hence distinct moralities. The morality of mediation lies in optimum settlement, a settlement in which each party gives up what he values less, in return for what he values more. The morality of arbitration lies in a decision according to the law of the contract. The procedures appropriate for mediation are those most likely to uncover that pattern of adjustment which will most nearly meet the interests of both parties. The procedures appropriate for arbitration are those which most securely guarantee each of the parties a meaningful chance to present arguments and proofs for a decision in his favor. Thus, private consultations with parties, generally wholly improper on the part of an arbitrator, are an indispensable tool of mediation.⁸⁷

In Fuller's understanding, everything about the different processes was different: the importance of finding facts, the role of precedent (both formally legal and in practice routines), who the third party neutral might be (including different kinds of neutrality and legal background), and the most opportune timing for use of the processes. Fuller believed strongly that arbitrators should never try to mediate. There would be too much "confusion of role,"⁸⁸ and clarity of role within a pure process was essential both for that process' integrity, and for the legitimacy of whatever outcome might be reached. For decisionmakers in adjudicative processes (whether in court or arbitration) it was

⁸³ Sander & Goldberg, *supra* note 76, at 50.

⁸⁴ See generally Lon L. Fuller, *Collective Bargaining and the Arbitrator*, 15 NAT'L ACAD. ARB. PROC. 8 (1962).

⁸⁵ See generally Fuller, *supra* note 67, at 353.

⁸⁶ Fuller, *supra* note 42, at 305.

⁸⁷ LON L. FULLER, *Collective Bargaining and the Arbitrator*, in COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE: PROCEEDINGS OF THE FIFTEENTH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 29 (Mark L. Kahn ed., 1962).

⁸⁸ *Id.* at 33.

central, for Fuller, that third parties be “detached” and “impartial”; in other processes the third parties’ knowledge of or embeddedness in the field might actually be an advantage.

In his work on arbitration and adjudication, Fuller explored the importance of decisions rendered by third party neutrals who would consider arguments and make decisions on behalf of one party, based on reasons. Those reasons, or agreed upon principles of law, were important to justify the particular decision and bind people and communities together in generally accepted understandings of what their communities valued. In this, adjudication is a public function (in the cases for which it was appropriate), as many current critics of ADR see it.⁸⁹ However, unlike many modern “litigation romanticists,”⁹⁰ Fuller thought that adjudication was not appropriate in a wide category of matters, including “managerial” or “administrative matters,” requiring deeper knowledge and an understanding of the embedded and complex interactions of an organization or industry. Similarly, he did not find adjudication appropriate in situations which required “reciprocity” (*i.e.*, marriage, business partnerships, contracts), nor in situations in which some other process was appropriate like elections, or in some cases, lotteries. Finally, he found adjudication unsuitable in situations that he labeled “polycentric” disputes, where multiple parties or a multiplicity of interests might be affected so that the binary solutions of adjudication could not resolve all the aspects of the issue, or where “decision” on one legal issue might unravel other interrelated issues or relationships. For Fuller, the core of adjudication (and arbitration) consisted of the need for parties to present their proofs (with evidence and reasoned arguments) in order to obtain decisions (by judges) to problems requiring authoritative resolutions from someone outside of the dispute or conflict. Adjudication is required when reasons and rationality are required (most often in claims of right or in declarations of guilt or innocence) and in Fuller’s terms, not all human problems should be resolved in this particular form of “rationality.”⁹¹ Adjudication, in Fuller’s conception, required the adversarial presentation of two sides of a case:

⁸⁹ Fiss, *supra* note 8, at 1075; Bone, *supra* note 62, at 1298.

⁹⁰ Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1874–75 (1997).

⁹¹ Late in his life Fuller expressed a humanistic philosopher’s concerns with the “new” sciences of game theory being applied to judicial decisionmaking. He feared the reductionist assumptions of economic interests and self-interested strategic behavior as the only forces that could motivate both judges and parties:

The chief danger in any application of game theory to judicial decision-making lies in the fact that it is essentially a theory of satisfactions that are, broadly speaking, ‘economic’ in nature, that is, are atomistic and individual. It is concerned with the ‘pay-off’ and not with the rewards of the game itself. . . . So judges may derive rewards from

An adversary presentation seems the only effective means for combatting this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances.⁹²

This assumption, that there are only two sides of a case, limits the usefulness of adjudication in many modern cases in which there are more than two sides, especially in modern litigation with interventions, class actions, interpleaders, and more than one issue to be determined. In this, Fuller saw more limits than advantages to adjudication in its capacity for social ordering in many important contexts. He was deeply skeptical about the use of adjudication in matters of deep social conflict, especially when social conditions might change faster than adjudication could “process” them. He had enough foresight to understand the development of mixed processes, such as in the wage setting processes he observed in his years at the War Labor Board, where he witnessed hybrids of negotiation and mediation, with threats of adjudication and some forms of med-arb. He found these hybrids disturbing, referring to most of these processes as “parasitic” on the purer forms. He believed that most of them would eventually fail and fall away, by leading to unstable or contested resolutions, because the underlying legitimacy of the form of process could inevitably be questioned post hoc.

Fuller’s questions about process integrity and morality,⁹³ as well as structural-functionalism, remain with us today. His focus on relationships introduces one of the major controversies in the field: whether mediation’s

collaborative efforts that transcend individual ‘pay-offs.’ . . . To see what this danger is we need only recall that what a judge may want (some of us are naïve enough to hope that this is what he will always want) is a decision that is just, proper, and workable.

Lon L. Fuller, *An Afterword: Science and the Judicial Process*, 79 HARV. L. REV. 1604, 1607 (1966).

⁹² Fuller, *supra* note 67, at 383.

⁹³ In addition to Fuller, there are others who have articulated a “morality” for particular processes. Murray Schwartz argued for different ethical rules of candor and disclosure and refusal to enforce substantively “unconscionable” negotiated agreements in private settings, as distinguished from what was required in open court. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 685–86 (1978). We are now engaged in many disputes about the appropriate ethical standards to apply in litigation, transactional work, mediation, and arbitration. See Center for Professional Responsibility, Ethics 2000-Commission on the Evaluation of the Rules of Prof. Conduct, at <http://www.abanet.org/cpr/ethics2k.html> (last visited Nov. 15, 2000); see also Code of Ethics for Arbitrators in Commercial Disputes (1977), available at <http://www.adr.org>.

purpose is to settle disputes and solve problems, an instrumentalist concern, or whether it is the reorientation of the parties to each other that characterizes what mediation, in particular, offers to human conflict. Fuller, like some modern commentators, sought to keep functions and structures separate. Some of us more modern theorists and practitioners believe it is possible to achieve multiple purposes or functions within more adaptive processes. Problems can be solved and relationships may be "reoriented" within the same process. Mediation is an "and/and," rather than an "either/or" process.

Lon Fuller, however, was not the only "parent" of process integrity. Soia Mentschikoff, one of the first women to leave a deep imprint on legal institutions, also argued for the particular strengths of non-adjudicative forms of dispute resolution. This "mother" of ADR, perhaps because of her many years serving as a Reporter on the Uniform Commercial Code, noted the procedural analogies⁹⁴ of dispute resolution to the substantive formulations of "common usage" and "reasonable practice, trade, or custom." For her, arbitration was an opportunity for those within an industry to self-govern and to find solutions that met their specific needs, instead of some generalized interests: "I think that self-government of such groups has necessitated a system of dispute resolution among its members and that arbitration has been chosen in preference to the courts, just as trade-rule or custom formulation was chosen in preference to formal legislative action."⁹⁵

Arbitration was not negotiation—it was not without rules. Mentschikoff argued, in sharp contrast to other proponents of arbitration, that arbitration did have rules and did utilize the rules of evidence. What arbitration does with rules is to examine them in the context of the particular dispute and to exercise a kind of common sense, rather than to apply an overly rigid or formal application. Hearsay objections are made and then considered for the ultimate reliability of the testimony offered.

Unlike Fuller, Mentschikoff actually undertook to study the variety of dispute processes empirically and thus, in a sense, is also the "mother" of empirical evaluation of dispute resolution. In studying a variety of trade association forms of dispute resolution, Mentschikoff was able to develop a taxonomy of forms of dispute resolution that included umpireal (arbitral), adjudicative, and investigative models.⁹⁶ In a highly sophisticated legal and

⁹⁴ Is there a "feminist" story here? Soia Mentschikoff focused on process, as well as substance, while Karl Llewellyn and other legal scholars and reporters focused more on the substance of the proposed rules.

⁹⁵ Soia Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 LAW & CONTEMP. PROBS. 698, 710 (1952).

⁹⁶ Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 846 (1961). Lisa Bernstein, appropriately now located at the University of Chicago, where Mentschikoff

sociological analysis, Mentschikoff noted a variety of factors that would determine not only if commercial arbitration was used at all, but what form it would take, whether it was individually initiated by contract, administered arbitration by an outside body like the AAA or the ICC, or controlled by a trade association. Different issues, like the need for rapid price information, foreign trade and resale, or the quality assessment of delivered goods, militated in favor of or against particular kinds of arbitral fora. For Mentschikoff, arbitration clearly justified itself primarily when particularized expertise was required to be exercised (as in the assessment of the quality of goods and reasonable price). However, such factors as location of evidence (*e.g.*, goods and documents) might also determine what kind of process is used because certain fora (both arbitral and adjudicative) are better for ordering production of documents.⁹⁷

Mentschikoff can also be seen as a student of process integrity and variability in her detailed historical and empirical descriptions of differences within industries and types of arbitration. Unlike the theoretical purity of Lon Fuller's work, Mentschikoff's association with legal realism⁹⁸ caused her to be interested in how arbitration actually worked. First, she saw it as more principled and controlled by precedent than negotiation or mediation, which she saw as a compromise process, requiring parties to give up parts of their claims or demands. Second, she observed that well developed trade associations combined arbitral fora with rules of ethics and disciplinary codes in order to develop fully

did most of her work as part of the law and behavioral science project at the University of Chicago, is replicating this work, looking at how modern trade associations resolve their disputes. *E.g.*, Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115 (1992).

⁹⁷ In their recent work analyzing the transformations in international commercial arbitration, Yves Dezalay and Bryant Garth have noted the increasing influence of American-style litigation modes, even within the international arbitration community. YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 3–6 (1996). This has occurred, in large measure, because of discovery rules in the American legal regime and choice of law provisions often insisted on by American controlled companies. *Id.* Mentschikoff's work previews these developments.

⁹⁸ Of course, as another axis of comparison, one should note that Fuller's experience was in labor arbitration and Mentschikoff's in commercial arbitration. These divisions of kinds of cases are currently very much at issue as we debate the applicability of the Federal Arbitration Act to labor and employment settings. *E.g.*, *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999), *cert. granted*, 68 U.S.L.W. 3724 (U.S. May 22, 2000) (No. 99–1379). Likewise, they are at issue as we consider the legal and policy issues implicated in the use of compulsory arbitration in both settings. Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 31–35 (1999).

elaborated legal systems within the trade that tended to rely more on precedent and principle than more ad hoc forms of arbitration (thus demonstrating variability in the degree of self-regulated industries).⁹⁹ She also noted that the failure to use attorneys in many trade controlled settings ensured that specific trade oriented standards, and not general legal principles, were emphasized. The American Arbitration Association, in contrast, provided a more ad hoc and casual form of arbitration which was dominated by lawyers and appealed to more general legal principles, and thus led to longer, more expensive, and more complex hearings. Because AAA arbitration awards often required court enforcement (as contrasted to trade enforcement), issues of procedure and enforceability and rules and judicial role became more important. Mentschikoff also contrasted the different forms of arbitration to other possible forms of decisionmaking; for instance, she examined courts and argued that arbitrators were more like jury members than judges in fact-finding and law application. In studying different forms of arbitration, she suggested that labor arbitration was as concerned with long-term contract interpretation as with the immediate dispute, while commercial arbitration looked to resolve specific and particular disputes fairly.

Like a wise and modern student of ADR, Mentschikoff refused to pronounce on which processes were “better” than others. She was concerned with both the caliber and quality of third party neutrals in all systems (courts, trade association arbitration, and administered arbitration). As a legal realist and legal scholar, she was concerned about the quality of rules and norms generated by the different processes. On the whole, she found arbitrators to be as “rational” and norm-based as judges, acknowledging that this could vary from case to case. (Statistically, one might say that the two processes on average looked the same on this dimension but that there were outliers or “tails” in both processes.)

As she and her husband, Karl Llewellyn, (and others) grappled with the larger jurisprudential and prudential issues of laws set down (legislation) versus norms to be evolved (custom or trade) in the drafting of the UCC, Mentschikoff found similar issues in the relationship of fact-finding and norm development

⁹⁹ Center for Public Resources, *Model Arbitration Procedures and Practices*, at <http://www.cpradr.org>. (last visited Aug. 15, 2000) (encouraging industry developed ADR systems (*i.e.*, construction, franchising, employment, banking, and health care)).

and enforcement in the variety of processes that could be used. Each process had its uses, each its distinctive advantages and disadvantages, and each was both structured by and, in turn, helped to structure the legal environment or culture from where it came. There were consequences to process choices—different processes both reflected and produced different rules and normative standards, but it could not be said that any one process was perfect or appropriate for all kinds of matters (even in the delimited field of commercial law). Like her successors in the Legal Process school, Mentschikoff (and Fuller, as influenced by his Legal Process colleagues) could see the importance and significance of institutional variability and legitimacy in process.

V. INSTITUTIONALIZED PROCESS: THE INSTITUTIONAL SETTLEMENT PRINCIPLES OF LEGAL PROCESS

Though few have made the argument explicit, much of the current penchant for “menus,” “multi-door courthouses,” and “fitting the forum to the fuss”¹⁰⁰ can find its historical roots in the work of the Legal Process scholars, Henry Hart and Albert Sacks. These scholars argued for a principle of “institutional settlement”¹⁰¹ or institutional competence or specialization—a purposive approach to legal institutions in which Lon Fuller sometimes joined:¹⁰²

A legal system *is* a system—a coordinated, functioning whole made up of a set of interrelated, interacting parts. The solution of specific legal problems constantly requires an understanding of the functions and interrelationships of more than one institutional process and frequently of several. Problems arising in a court call for a perceptive awareness not only of what courts are for but of what a legislature is for and sometimes also of what an administrative agency is for and of what matters can best be left to private decision. . . . Lawyers at the stage of private counseling have again and again to consider whether to

¹⁰⁰ Here we have another case of appropriation from another “father of invention.” Maurice Rosenberg, a civil proceduralist par excellence (and eventual ADR teacher and scholar—one of the few proceduralists to embrace ADR) is the originator of the phrase “fitting the forum to the fuss.” Sander & Goldberg, *supra* note 76, at 67. See generally Maurice Rosenberg, *Resolving Disputes Differently: Adieu to Adversary Justice?*, 21 CREIGHTON L. REV. 801 (1988) (endorsing the variability of dispute processes).

¹⁰¹ HART & SACKS, *supra* note 25, at 1.

¹⁰² For a discussion of the evolving membership of the legal scholars who contributed to the Legal Process project, see William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, in HART & SACKS, *supra* note 25, at li-cxxvii. For an argument that institutionalism was key to Fuller’s “process” jurisprudence, see Bone, *supra* note 62, at 1275.

invoke the procedures of private or of judicial settlement or, often alternatively, of legislative or administrative settlement. The development of these awarenesses calls for study which comes to grips with the questions of what each of these various processes of decision *is* good for and how each interrelates and interacts with the others.¹⁰³

Hart and Sacks sought to explore the varieties of ways in which decisionmaking is conducted in the legal system. They conceived of the legal system broadly, including both private and public forms of social and legal ordering.¹⁰⁴ Hart and Sacks resonate with the ADR “canon” or theory in many ways, as they demonstrated by opening their book with an effort to explain the necessity of “cooperation” in social life.¹⁰⁵ They spoke of “satisfying wants,” thus employing the social welfare language that some of us¹⁰⁶ use today, and not

¹⁰³ Henry M. Hart, Jr. & Albert M. Sacks, *Preface to the 1958 “Tentative Edition”* of HART & SACKS, *supra* note 25, at cxxxvii. Here I must add a personal note and thank the “father” of many of my own inventions. Professor and former Dean David Filvaroff, currently of the Buffalo Law School, taught me the Legal Process materials at the University of Pennsylvania Law School, from which I believe I can date most of my academic interests, including my work in ADR and process theory generally, civil procedure and the importance of participatory and experiential learning in legal education. (I began and continue to teach clinically and experientially.) Filvaroff had groups of students participate in role-plays in which we treated the same legal problem (whether slumlordism should be made legally actionable through common law tort or regulatory action) in several different legal processual methods (legislative, judicial, and regulatory). Now I would add negotiated processes to the mix and try some new hybrid variations on the classic three branches of government—reg-neg, consensus building, mediation, and med-arb.

¹⁰⁴ Their book and teaching approach consisted of exploring these issues through specific legal problems to be solved. This is an important historical and pedagogical point to remember in light of current approaches to and suggestions for looking at lawyers as problem solvers. *E.g.*, Janet Reno, *Lawyers as Problem Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5 (1999); Carrie Menkel-Meadow, *Taking Problem-Solving Pedagogy Seriously: A Response to the Attorney General*, 49 J. LEGAL EDUC. 14 (1999).

¹⁰⁵ Critics and historians would suggest that this optimism and focus on cooperation exemplified the period in which this work was written—the American euphoria and prosperity of the 1950s when we all believed in continuous economic progress and universal “expanding pies.” That may be true, but the 1950s was also the time of the Cold War and direct adversarial engagement with a large and well-armed political foe, and it would have been just as easy to focus on adversarialism, distributive and scarcity problems, and war and conflict as cooperative American triumphalism.

¹⁰⁶ I specifically chose “needs” rather than “interests” as the concerns of parties to be dealt with in negotiation and dispute resolution. Menkel-Meadow, *supra* note 3, at 794. For some other uses of “needs” rather than “interests” theory, as applied to international conflict resolution, see generally CONFLICT: HUMAN NEEDS THEORY (John Burton ed., 1990). Of course, in the real world, both needs and interests will be expressed in conflicts and disputes, where they sometimes overlap and sometimes lead in different directions.

the more “neutral” or economic “interests” of some bargaining literature. They also saw law as a “social science,” concerning themselves with specifying the conditions under which human beings could peacefully co-exist and order their relations. They also recognized the variability of people, groups, and the institutions humans create to achieve their goals. Hart and Sacks saw “constitutive or procedural” understandings of people and groups as more fundamental than the substantive understandings that a group of people must arrive at—which is why we call it the legal “process” school. Institutionalized patterns of procedures and processes for making rules, judging violations, and structuring relationships are thus essential to any society which seeks to function smoothly. The “principle of institutional settlement,” then, is that every society requires the establishment of “regularized and peaceable methods of decision” and that decisions made through these methods should be accepted as binding on the society “unless and until they are duly changed.”¹⁰⁷ Most importantly for our purposes, Hart and Sacks recognized that “different procedures and personnel of different qualifications invariably prove to be appropriate for deciding different kinds of questions.”¹⁰⁸

Hart and Sacks also recognized the importance of lawyers in processes designed to prevent disputes, by using their most creative powers¹⁰⁹ of transaction planning and framing. In their planning of relationships and transactions, through, for example, the drafting of contracts, wills, deeds, constitutions, statutes, and articles of incorporation, lawyers could consider both the creation of and application of rules, both substantive and procedural, that govern human interactions.¹¹⁰ Hart and Sacks, like Fuller, were intent on achieving recognition of the lawyer’s role as “an architect of social structure,”¹¹¹ in addition to the more familiar role of representative in formal litigation. Indeed, Hart and Sacks make among the first references to the lawyer’s role as negotiator and dispute resolver by suggesting that the lawyer’s function as a “representative

¹⁰⁷ HART & SACKS, *supra* note 25, at 4.

¹⁰⁸ *Id.*

¹⁰⁹ For my application of these ideas of recognizing the “creativity” in legal transaction planning and doctrinal development, see generally Carrie Menkel-Meadow, *supra* note 47; Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785 (2000).

¹¹⁰ HART & SACKS, *supra* note 25, at 175.

¹¹¹ *Id.* at 176. This phrase has been adapted by more recent commentators as “process architect,” “transaction cost engineer,” and other similar phrases. *E.g.*, Ronald Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 254–56 (1984); Ronald Gilson & Robert Mnookin, *Foreword: Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1, 2 (1995).

in the private settlement of disputes without litigation” was every bit as important as the more well-known role of the lawyer in court. To perform this function well the lawyer needs to have “skill in anticipating the probable outcome of litigation and so in estimating the bargaining strength of each side; skill in negotiation in finding common ground of mutual advantage between the parties; and skill in the formal exercise of the legal powers which make the settlement binding.”¹¹²

Hart and Sacks included private arbitration (in both the commercial and labor contexts) as one of the legal processes that lawyers must master,¹¹³ while simultaneously presaging several of the issues we hotly debate now—such as the compulsory use of what was intended to be a voluntary and private process. Only after review of these important processes of private ordering and “internal dispute settlement” did Hart and Sacks canvass the more conventionally studied legal processes of courts and common law decisionmaking, as well as legislation, the political process, and administrative processes.¹¹⁴ The use of the Legal Process materials in American law schools for so many years, without publication, demonstrates the transition in forms of legal process, reasoning, problem solving, and institutional development that characterized this period of changing boundaries between public and private law and adjudication and the regulatory state.¹¹⁵ While Hart and Sacks struggled more obviously with legislative and administrative processes, their recognition of the importance of private ordering and “alternative” legal processes, both in dispute settlement and prevention, as well as in transaction and arrangement formation, has made a

¹¹² HART & SACKS, *supra* note 25, at 179.

¹¹³ *Id.* at 304–30.

¹¹⁴ Even in this, Hart and Sacks radically expanded what was commonly studied in legal education, with its almost exclusive focus on courts and judicial decisionmaking. Their detailed attention to political processes and legislation remains one of the primary and most complete sources of political bargaining processes in law, as contrasted to the “rational argument” form of decision making associated with so much of legal reasoning. For more modern applications of the differences in rational argument and bargaining models in Constitutional and other forms of law making, see generally JON ELSTER, *Strategic Uses of Argument*, in BARRIERS TO CONFLICT RESOLUTION (Kenneth Arrow et al. eds., 1995); JON ELSTER, *ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS* (1999); JON ELSTER, *SOLOMONIC JUDGEMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY* (1989); JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* (1989); *CONSTITUTIONALISM AND DEMOCRACY* (Jon Elster & Rune Slagstad eds., 1988); Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

¹¹⁵ For a more recent exploration of the false dichotomies in the public-private distinctions in the regulatory state, see generally Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) (arguing that public and private actors “negotiate” their roles in regulation and governance in the modern administrative state).

major contribution to the pluralistic way in which we modern legal process scholars and practitioners see the world.

The old Legal Process school has now given birth to several strains of “new legal process” sensitivity, recognizing that process is pluralistic and that different institutional arrangements of process are necessary to meet different kinds of individual and institutional needs. In one sense, the “new legal process” represented by ADR is a direct descendant of Hart and Sacks’ Legal Process school, recognizing a greater diversity of legal processes that are responsible for maintaining social order. “Appropriate” dispute resolution processes recognize a fuller menu of primary and hybrid processes, including mediation, arbitration, med-arb, evaluative mediation, early neutral evaluation, summary jury, and judge trials,¹¹⁶ all of which reflect a combination of the primary processes of negotiation, adjudication, and mediation in order to achieve different results dependent on the kinds of parties, issues in dispute, or numbers of parties involved. Fuller’s recognition of a “polycentric” dispute has given way to the realization that there are many kinds of polycentric disputes, some of which require public fora because they will make law for many others (*e.g.*, negotiated rulemaking or reg-neg),¹¹⁷ but some which the parties prefer to deal with privately (*e.g.*, the mini-trial). By “fitting the forum to the fuss,” lawyers and parties are now more sophisticated about analyzing which processes are appropriate for particular kinds of desired outcomes or procedures.

While some have argued for a new form of “micro-institutionalism” in the study of legal institutions, following on from the “neo-institutionalism” in the social sciences,¹¹⁸ others that focus on process suggest that we can revivify some of the old forms. As deliberative democracy takes hold in social theory and political science in the theoretical work of Jurgen Habermas and the more practical explications of Amy Gutmann and Dennis Thompson,¹¹⁹ process itself has become re-enshrined as the characteristic which defines democracy and legitimate political process. Communicative action through “ideal speech conditions” in which people articulate their arguments, both to persuade and to bargain¹²⁰ is thought to provide the new “glue” which will order social life and

¹¹⁶ Alternatives to the High Costs of Litigation, *The ABCs of ADR: A Dispute Resolution Glossary*, 13 CPR INST. FOR DISP. RESOL. 147, 150 (1995).

¹¹⁷ Philip Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982); Philip Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 DUKE L.J. 1389 (1997); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997).

¹¹⁸ Rubin, *supra* note 26, at 1393.

¹¹⁹ GUTMAN & THOMPSON, *supra* note 28.

¹²⁰ HABERMAS, *supra* note 27.

keep widely diverse individuals together in a democratic state and a lively civic culture. Where we cannot agree on substantive ends (the old liberal saw), we can probably agree on processes through which we listen and try to persuade each other. Thus, while many of these theorists would deny it, modern democratic processes can be thought of as mediation writ large.¹²¹ The recent experimentation with new forms of legal and political processes has revitalized aspects of legal and social decisionmaking that would likely hearten Hart and Sacks. Added to the older processes of private ordering, decisional-court, legislative and administrative processes, newer processes like “consensus building”¹²² broaden democracy’s reach by involving stakeholders or interested parties in settings that engage participation beyond voting and professional representation. These processes encourage involvement in direct decision making in such matters as environmental siting and preservation, municipal government and funding, race and cultural difference issues, budgeting, socially divisive issues like abortion and affirmative action, and formal regulation and mass tort liability.¹²³ Even where specific decisions are not reached or solutions to “problems” are not found, dialogue and discourse in the public sphere offer a new “proceduralist” theory and practice¹²⁴ of democracy. Thus, process pluralism is clearly an important legacy of the past that has adapted to new legal and social conditions.

Lawyers, as consummate “proceduralists” and “process architects,” have an important role to play in the implementation of more participatory and complex forms of process—a role which the Legal Process scholars saw as more variegated than simply litigating or advising.¹²⁵

¹²¹ At least one model of mediation seeks just that—empowerment and recognition and mutual respect, not necessarily producing a particular outcome or “settlement.” See BUSH & FOLGER, *supra* note 75, at 81–112.

¹²² THE CONSENSUS BUILDING HANDBOOK, *supra* note 29.

¹²³ It has been suggested that Judge Jackson should have constructed another type of process in the Microsoft antitrust action when it became clear that that was a multi-party (not two-sided) dispute. (Consider the conflicting roles of the state attorney generals juxtaposed with the federal government’s interests, in addition to the obvious interests of Microsoft and the less obvious interests of a very complex consumer market). See *United States v. Microsoft*, 97 F. Supp. 2d 59 (D. D.C. 2000).

¹²⁴ Political philosophers are concerned about making the connections between the theory of discourse and deliberative democracy and its practice in the real world. See, e.g., BOHMAN, *supra* note 28, at ix–x.

¹²⁵ This is not to suggest that only lawyers may facilitate or design such new processes, but that lawyers may be particularly well suited to marry legal formalities and requirements to more flexible, fair, and participatory modes of political and legal action. Whether lawyers hinder such processes by focusing too exclusively on legalistic or “due process” concerns or whether lawyers will learn to utilize their craft to develop flexible and effective new

VI. QUALITY OF OUTCOMES IN DISPUTE RESOLUTION

For many proponents of ADR, however, the Fullerman purpose is not complexity or diversity of process, but better outcomes. As modern negotiation theorists urge “win-win”¹²⁶ solutions, “expanding the pie, before dividing it” or creating value before claiming it,”¹²⁷ it is useful to recall one early father, far removed from the legal arena. Vilfredo Pareto, as an economist and sociologist, is responsible for what we now call “pareto-optimality,” an outcome measurement which searches for the best possible outcome for parties along an axis of preferences, in which each party is made as well off as possible without further harm to the other party.¹²⁸ Some processes may be preferred because of their tendency to produce more pareto-optimal solutions, as in “strategic cooperation,”¹²⁹ as studied by game theorists and decision scientists, in information sharing and trades that are made possible, but the goal is a utilitarian one of making the parties as well off as possible without unnecessary harm to each other. This does raise issues, however, about possible harmful externalities “exported” to others.¹³⁰

processes, to produce different kinds of outcomes remains to be seen. For some discussions of how lawyering constructs may both hinder and facilitate new institutional developments, see generally Menkel-Meadow, *supra* note 31. See also Susan Sturm, *From Gladiators to Problem Solvers: Connecting Conversations About Women, the Academy and the Legal Profession*, 4 DUKE J. GENDER L. & POL’Y 119, 146–47 (1997); Roger Conner, *Community Oriented Lawyering: An Emerging Approach to Legal Practice*, NAT’L INST. OF JUST. J., Jan. 2000, at 26.

¹²⁶ This seems an appropriate time for me to say why “win-win” is not how I would describe negotiation or conflict resolution. In many disputes, and most legal conflicts it will be impossible for both (or all) parties actually to “win” something. Consider the criminal defendant who may bargain for a “better” deal (less incarceration), but who will still be imprisoned. We aim for solutions that are “better than” some other baseline (an inferior process or a more limited scope of possible remedies) so we can improve on what might otherwise be possible. That does not necessarily mean that all parties will “win” something. So, I prefer to stay away from the “win-win” language as much as I do not like “win-lose” either. We are just trying to avoid “lose-lose” (negative sum games) outcomes as much as possible. Carrie Menkel-Meadow, *The Art and Science of Problem-Solving Negotiation*, TRIAL, June 1999, at 48, 49.

¹²⁷ LAX & SEBENIUS, *supra* note 41, at 30–33. See generally ROBERT MNOOKIN, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000).

¹²⁸ E.g., RAIFFA, *supra* note 23.

¹²⁹ See, e.g., AXELROD, *supra* note 22; ADAM BRANDENBURGER & BARRY NALEBUFF, *CO-OPERATION* (1996).

¹³⁰ Many pareto-optimal solutions between transaction parties, for example, may result in throwing off costs to others (or decreased taxes paid to the IRS, for example), so a more

Similarly, much of the underlying and often implicit assumptions of negotiation and bargaining processes in modern ADR theory draw from the work of George Caspar Homans, who suggested that even with “universal” Maslovian needs,¹³¹ human beings have very different preferences and interests which will often be complementary, not conflicting.¹³² Where people desire different things, trades (or “logrolling,” as they say in game theory and politics)¹³³ are possible and help to facilitate agreements. Thus, linking these insights about psychology to legal processes, what might be good for trial (narrowing issues) is actually dysfunctional for settlement—the more issues, the merrier, for more possible trades and a settlement point further out on the Pareto frontier. Thus, new legal process theorists have made use of a different form of social science than did the first generation of realists—using the human psychology of decisionmaking, not only by legal elites, but by clients, parties, and others involved in legal disputes. Work done by psychologists who study creativity, for example, may provide some insights into how substantive legal solutions are actually crafted.¹³⁴

Another little acknowledged “mother” of the field provided one of the earliest and most interesting empirical studies of how differences in processes do produce different outcomes. In *Settling the Facts: Discretion and Negotiation in Criminal Court*,¹³⁵ Pamela Utz studied the different plea bargaining processes of two different criminal court jurisdictions. In one, an adversarial, competitive model of prosecutors and defense counsel produced a highly conflictual, less efficient, and less effective system of criminal sentencing and social control. In

broadly defined notion of pareto-optimality that was outcome focused might need to consider all possible parties affected by an outcome produced by a conflict resolution process. Consider, for example, children in a divorce or employees in a merger.

¹³¹ See generally ABRAHAM H. MASLOW, *MOTIVATION AND PERSONALITY* (1954).

¹³² Recall Mary Parker Follett’s window, my desire for chocolate icing and my brother’s for cake, and the different preferences of those picking at a diverse cocktail mix (including peanuts, goldfish, pretzels, cashews, and wheatchex). Menkel-Meadow, *supra* note 7, at 1620 n.36.

¹³³ The term originates in the fact that it usually requires more than one person to coordinate “rolling” or moving a log. Martin P. Golding, *The Nature of Compromise: A Preliminary Inquiry*, in *COMPROMISE IN ETHICS, LAW AND POLITICS*, *supra* note 38, at 13–14.

¹³⁴ Menkel-Meadow, *supra* note 47; HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* (1983); MIHALY CSIKSZENTMIHALYI, *CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION* (1996); TERESA AMABILE, *CREATIVITY IN CONTEXT* (1996). One can look to Hart and Sacks’ descriptions of legally creative regimes both in private ordering (percentage of gross commercial leases) and in statutory schemes and common law developments. See HART & SACKS, *supra* note 25, at 183.

¹³⁵ PAMELA UTZ, *SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT* (1978).

another court, with another culture, prosecutors, defenders, and eventually, even the judges, constructed a more “negotiable” justice, with less overcharging, more realistic and tailored sentences with a philosophy of treatment and reduction of recidivism, rather than a purely punitive goal.¹³⁶ To the extent that the success of outcomes could be measured, Utz found that a culture of “substantive justice” obtained in the court with more reasonable and candid bargaining practices than in the court with more rigid and adversarial routines. Ironically, most of the impetus for a more “negotiated” plea bargain culture came from a desire to increase court efficiency and reduce judicial divisiveness. Utz’s study of two courts remains one of the most carefully researched and thickly described empirical analyses of how different outcomes can result from variations in process. Her book is also an important and rigorous explication of the advantages of some non-adjudicative approaches to even the most intractable of our legal system’s problems—the criminal justice system. It is both heartening and discouraging at the same time to revisit such classic studies when we reflect on the current irony of less flexibility in the federal courts in determinate sentencing, as some states more creatively explore the kind of “substantive justice” or treatment goals described by Utz.¹³⁷

As scholars and practitioners of dispute resolution become more sophisticated about designing process to achieve particular outcomes, they have turned to other fields for insights about how the people inside of institutions behave.

VII. BARRIERS TO AND OPPORTUNITIES FOR DISPUTE AND CONFLICT RESOLUTION

Some legal scholars of dispute processing and conflict resolution have also drawn on the work of fathers in cognitive science to help us understand why resolving conflict is sometimes so difficult. In Kenneth Arrow’s edited volume

¹³⁶ The studied courts were of two counties in California before determinate sentencing more or less eliminated the possibilities of individualistic and tailored sentences.

¹³⁷ In the criminal justice field, a growing number of state courts are utilizing multi-disciplinary “problem solving courts” in drug, gun, family, and domestic violence settings. E.g., Judith Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 HASTINGS L.J. 851, 857, 859–62 (1997). See generally Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. STUDY OF LEGAL ETHICS 199 (1999); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000).

on *Barriers to Conflict Resolution*,¹³⁸ psychologists describe the various reasoning errors and biased heuristics we use when reasoning alone or with others in the negotiation process. Distortions in thinking like reactive devaluation, availability, recency, primacy, loss and risk aversion, as well as overconfidence and labeling theory tell us that adversarial processes (and much of legal reasoning) may actually impede good dispute resolution by limiting what we can hear from the other side and how we can process important information.¹³⁹ These theories and empirical results also help us understand the importance of curative actions we can take. Mediators who are neutral offerors of proposals and information can correct for reactive devaluation and reduce waste in informational distortions.¹⁴⁰ Thus, those who are concerned with resolving conflicts in either a qualitatively better or more efficient way are willing to recognize expertises that transcend the law and legal science. The teachings of our mothers and fathers—that dispute processing, even when legal, is psychologically and socially situated—are finally being assimilated.

While cognitive science has illuminated some of the “barriers” to conflict resolution, other theorists and empiricists present a more optimistic picture for dispute resolution scholars and practitioners. Robert Axelrod’s *The Evolution of Cooperation*¹⁴¹ demonstrated (admittedly in an artificially constructed computer tournament of iterated Prisoner Dilemma games) that a highly cooperative strategy (“tit for tat”—be nice and only retaliate when someone is bad to you, then quickly forgive) was robust and more successful than more competitive strategies. This work has led to applications in biology, politics, and law as researchers seek to understand how cooperative genes and cooperative behaviors have succeeded in a world posited to be governed principally by self-interestedness.¹⁴² As Robert Ellickson’s empirical study of cooperative neighbors in a remote California county demonstrated,¹⁴³ social norms, in certain identifiable settings (such as with “iterated” long-term relationships or spatial proximity) may produce more coordinated and collaborative human interaction than the assumptions of a Hobbesian man-eat-man competitive Leviathan. So,

¹³⁸ BARRIERS TO CONFLICT RESOLUTION (Kenneth Arrow et al. eds., 1995).

¹³⁹ See generally MAX BAZERMAN, JUDGMENT IN MANAGERIAL DECISION MAKING (4th ed. 1998); Robert Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235 (1993); Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOT. J. 389 (1991).

¹⁴⁰ See generally Howard Raiffa, *Post-Settlement Settlements*, 1 NEGOT. J. 9 (1985).

¹⁴¹ AXELROD, *supra* note 22, at 14–28.

¹⁴² See, e.g., RICHARD DAWKINS, THE SELFISH GENE (1976); cf. DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE (1994).

¹⁴³ ELLICKSON, *supra* note 49.

now even law and economics scholars are interested in understanding how social norms (or “informal” rules of social behavior) operate to both control and facilitate human interactions that somewhat de-centers law and focuses on informal and social processes that present “opportunities” as well as barriers for dispute and conflict resolution.¹⁴⁴

The important legacy of this new body of work is to push us to seek explanations to understand under what conditions cooperation and coordination can emerge, and under what conditions the barriers to peaceful coexistence or resolution are more dominant. The field of international conflict resolution, for example, is a theoretical and empirical battleground for pessimistic barrier theorists¹⁴⁵ and more optimistic opportunity seekers in dispute resolution mechanisms.¹⁴⁶

VIII. CONCLUSION: LEGACIES AND NEW DIRECTIONS

The field of dispute resolution now demonstrates great intellectual eclecticism (some would say breadth), coupled with an almost necessary American pragmatism in its practice and constantly expanding application to new fields of human endeavor. It should be clear from this brief, and somewhat idiosyncratic, review of some of our founding concepts that dispute resolution lies at the center of an intersection of many disciplines and is a discipline and practice for which the term “applied science” might have been invented.¹⁴⁷ It remains to be seen what new learning will inform the field and whether that learning will come predominantly from inside law, legal science, and legal institutions or, more likely, from without. To the extent that dispute resolution engages individuals in relation to each other, situated in private and public

¹⁴⁴ This “Johnny-come-lately” (if I may call it that) interest of the law and economics community in social interaction would greatly amuse many of our founding mothers and fathers, who argued for the primacy of social interactionist models of dispute resolution from the start. *E.g.*, Lon L. Fuller, *Human Interaction and the Law*, in *THE RULE OF LAW* 171 (Robert Paul Wolff ed., 1971).

¹⁴⁵ *E.g.*, MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* (1993).

¹⁴⁶ *E.g.*, *WORDS OVER WAR: MEDIATION AND ARBITRATION TO PREVENT DEADLY CONFLICT* (Melanie C. Greenberg et al. eds., 2000).

¹⁴⁷ Indeed, scholars such as Howard Raiffa and Donald Schön have both articulated and engaged in developing both the theory and applications of a variety of these contributing disciplines to the “applied” domains of dispute resolution, decision science, and policy formation. *E.g.*, HAMMOND, *supra* note 23; DONALD SCHÖN & MARTIN REIN, *FRAME REFLECTION: TOWARD THE RESOLUTION OF INTRACTABLE POLICY CONTROVERSIES* (1994).

relationships, in varied configurations of institutions, we will take our knowledge from disciplines that focus on both individual and collective action. Thus, I hope to have illustrated the importance of continuing to remember the intellectual contributions of our founders from a diversity of fields, so that in paying attention to past insights (and meticulous empirical work) we will know to search widely and deeply for new ideas, explanations, and practices.

So, what principles or teachings do we take away from the mothers and fathers of invention who founded our field, whether wittingly or not? From these intellectual founders, I take the following major precepts that have greatly informed the more modern classics in our new canon:

1. Conflict can be good and a potential source of creativity. It is not always to be resolved or squelched. Conflict handled appropriately can put the parties (and the rest of us) in a better position than we were before or than we might be in if left to our own devices (or litigation).

2. Good resolutions of conflicts and problems in the law can occur when people realize that valuing different things differently is good. Money need not be a proxy for everything, an assumption that can lead to bitter zero-sum games and distributive or unnecessary compromise outcomes. More issues and more trades enhance the likelihood of both the number and quality of possible resolutions.

3. Different dispute resolution processes produce different kinds of outcomes. Where there is a need for a decision, with a reasoned and reported basis, adversarial argumentation may be more important to framing the resolution. Where there is more than one party or more than one issue ("polycentric" disputes), however, single decision outcomes may not be wise, and mediation, or a negotiated consensus, rather than a single issue, externally imposed decision may be better.

4. Settlements or mediated solutions do not have to be compromises or "split the difference" outcomes. By exploring different values and underlying interests, creative solutions and integrative outcomes may be possible.

5. Institutionalized choices about processes facilitate an appropriate range of public and private participation in different kinds and levels of matters and may legitimate both individual cases and the larger legal and political system in which those cases are handled. Different dispute institutions will have their own special competencies, expertises, and morality for handling particular kinds of matters, which may change over time, developing a kind of "process integrity."

6. Processes produce different kinds of outcomes—there are no universal processes that will always be better, fairer, or more efficient than others. Dispute processes are part of the larger culture in which they are embedded and also help create a community's sense of self. Different kinds of disputes will call for different kinds of "handling," "managing," or "resolution."

7. Variations and choices in processes used to resolve particular matters or to plan future arrangements or transactions in a society are likely to increase participation in and legitimacy of the outcomes reached.

8. The human conditions under which peaceful collaboration and cooperation versus conflict and aggression exist are variable, and we continue to need more theory and more practice to elaborate when we mortal actors can influence each other's behavior.

In reviewing these contributions of our intellectual forbearers, a question comes to mind. Is there nothing new under the sun? Can every new insight about dispute processes be traced to some earlier theorist, scholar, or empiricist? I think the answer to that question is that humans and legal scholars (sometimes co-extensive groups) do often "create" ideas without tracing their origins and considering what intellectual and social forces produce particular questions and answers at particular times. There may be no new questions to ask, but there are plenty of new situations and conditions against which to measure and re-consider pronouncements by earlier generations. In reviewing our mothers and fathers of invention in the field of dispute resolution, I am both awed by how much they have given us and challenged by how much has changed that requires new thinking on these old themes.

